INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Treaty involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	18
Appendix	19

CITATIONS

Cases:	
Albrecht v. *United States*, 329 U. S. 599	17
Angarica v. *Bayard*, 127 U. S. 251	17
Smyth v. *United States*, 302 U. S. 329	17
United States v. *North American Co.*, 253 U. S. 330	17
United States v. *North Carolina*, 136 U. S. 211	17
Treaties and statutes:	
Treaty of April 16, 1851:	
Article 3	10
Article 4	10
Treaty of September 10, 1853, 10 Stat. 1018	11
Article 1	12
Article 2	12
Treaty of September 19, 1853, 10 Stat. 1027	11
Article 1	12
Article 2	13
Treaty of November 18, 1854, 10 Stat. 1122	12
Article 1	13
Treaty of November 29, 1854, 10 Stat. 1125	9, 12, 14
Article 1	2, 4, 6, 14–15
Article 3	5
Article 4	5
Article 5	5
Article 6	5
Treaty of January 22, 1855, 10 Stat. 1143	12
Article 1	13
Article 2	13
Treaty of December 21, 1855, 12 Stat. 981	12
Article 1	13
Article 3	13

903489—50——1

199645

Treaties and statutes—Continued

	Page
Act of June 5, 1850, 9 Stat. 437:	
Sec. 1	9
Act of August 26, 1935, 49 Stat. 801	3
Sec. 4	7
Miscellaneous:	
Sen. Ex. Doc. No. 25, 53d Cong., 1st sess., pp. 20–21	10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 282

UNITED STATES OF AMERICA, PETITIONER

v.

ROGUE RIVER TRIBE OF INDIANS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on April 3, 1950, by the United States Court of Claims.

OPINIONS BELOW

The first opinion of the Court of Claims (R. 68–75) is reported in 105 C. Cls. 495. Its final opinion (R. 90–100) is reported in 89 F. Supp. 798.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1950 (R. 103–104). On June 23, 1950, this Court extended the time for filing this petition to and including August 30, 1950 (R. 107). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the court below employed an improper basis of valuation.

2. Whether there was a taking of Indian lands under the Fifth Amendment or merely a breach by the United States of a contract to sell Government lands for Indian benefit, in which case allowance of interest from the date of breach is improper.[1]

TREATY INVOLVED

The pertinent provision of the Treaty of November 29, 1854, 10 Stat. 1125, reads as follows:

> ARTICLE FIRST. The confederate bands of Umpqua and Calapooia Indians cede to the United States all their country included within the following limits, to wit: [here follows land description].
>
> Provided, however, that so much of the lands as are embraced within the following limits, shall be held by said confederated

[1] If review is granted additional questions will be presented as follows: (1) Whether the court below erred in holding that general, nomadic occupancy of the reserved area by the Indians is sufficient to constitute that area a "particular" tract "then actually occupied by said Indians," within the meaning of the proviso to Article 1 of the treaty; and (2) whether, even if there was a taking under the Fifth Amendment, the Court of Claims erred in mechanically allowing interest as an element of just compensation without consideration of the fact that the Government had fulfilled its obligation to the Indians to provide improvements on the new reservation otherwise than by sale of the lands, and without consideration of the benefits and expenditures made by the United States in behalf of the Indians.

bands, and such other bands as may be designated to reside thereupon, as an Indian reservation. To wit: [here follows land description]. And should the President at any time believe it demanded by the public good and promotive of the best interests of said Indians to be located elsewhere, the said Indians agree peaceably, and without additional expense to the government of the United States, to remove to such reserve as may be selected; provided that a delegation of three or more of the principal men of said bands selected by them, shall concur with the authorized agent or agents of the United States in the selection of said new reserve. And when said removal shall take place, the particular tracts then actually occupied by said Indians, on the reserve herein described, according to the provisions of this treaty, and those occupied by Indians of other bands that may be located thereon, shall be sold by order of the President of the United States, and the proceeds of such sales expended in permanent improvements on the new reserve, for the use and benefit of the holders of said tracts respectively.

STATEMENT

This action was instituted by numerous plaintiff bands of Indians pursuant to the Act of August 26, 1935, 49 Stat. 801, conferring jurisdiction on the Court of Claims to determine claims arising out of certain ratified treaties

which had been concluded with the plaintiff bands or tribes in 1853, 1854 and 1855. This petition is concerned with only the claim of the Confederated Bands of the Umpqua and Calapooia Indians arising from the Treaty of November 29, 1854, 10 Stat. 1125.[2]

Under Article 1 of that treaty (pp. 2–3, *supra*), these Indians ceded to the United States all lands claimed by them in the Oregon Territory. It was further provided that a described portion of the lands ceded containing about 67,820 acres "shall be held by said confederated bands [Umpquas and Calapooias] and such other bands as may be designated to reside thereupon, as an Indian reservation." The Indians further agreed to remove to another reservation should the President at any time determine that the public good or the best interests of the Indians would be thereby served, in which event the Government agreed that "the particular tracts then actually occupied by said Indians, on the [67,820-acre] reserve herein described, according to the provisions of this treaty, and those occupied by Indians of other bands that may be located thereon, shall be sold by order of the President of the United States, and the proceeds of

[2] This case is a companion case to *United States* v. *Alcea Band of Tillamooks, et al.*, No. 281, in which a petition for certiorari has been filed. Both have in common the question of whether the Court of Claims applied an improper standard of value.

such sales expended in permanent improvements on the new reserve, for the use and benefit of the holders of said tracts respectively."

By Article 3, the Government agreed to make specified annual payments for a period of twenty years, such payments to be expended for the use and benefit of the Indians. A further payment of $10,000 was provided for in Article 4, to be used for the Indians' benefit at the time of their removal to a new reservation. Article 5 authorized the President to make individual allotments to Indians, either on the reservation described in the treaty or on any reservation to which they might be moved. Under Article 6, the Government agreed to provide specific improvements, consisting of a blacksmith shop, a hospital, and a schoolhouse, and to provide professional services in connection therewith for a certain period of years.

A little over a year after the treaty was signed, the Umpqua and Calapooia Indians were removed from the 67,820-acre reserved area to the Grand Ronde Reservation (Fdg. 32, R. 57), this removal being influenced by the outbreak of the Rogue River War (Op., R. 91). Upon their removal, the United States did not sell "particular tracts then actually occupied by said Indians" on the 67,820-acre reserve for the purpose of providing improvements on the new reservation as contemplated by Article 1 of the treaty.

The Court of Claims, on the preliminary question of liability held that the Indians were en-

titled to just compensation under the Fifth Amendment for that portion of the 67,820-acre reserve which was "actually occupied by them at the time of their removal" (Conc., R. 68; Op., R. 71). The court found that there was no evidence in the record showing that any individual Indians of the tribes "had occupied any particular tracts" (Fdg. 32, R. 58).

The court nevertheless held that the whole of the 67,820-acre reserved area had been occupied by the Indians, within the meaning of the treaty provision. The court based that view on the proposition that the general character of occupancy by Indians who live by hunting and fishing was sufficient to make the reserve a "particular tract" "then actually occupied by said Indians" within the meaning of Article 1 of the Treaty (Fdg. 2, R. 78; Op., R. 91–92).

The court found that on December 21, 1855, the date of valuation, the 67,820 acres of land had a value of $67,820.00 or $1.00 per acre (Fdg. 12, R. 88). To this sum the court added interest for 79 years at 5% from December 21, 1855, to December 21, 1934, and for 15 years at 4% from December 21, 1934, to April 3, 1950, such interest totalling $309,357.16, making a total amount of $377,177.16 for the land. To this was added $14,315.88, an amount found to be due the Indians on the earlier hearing and not in question here, making a total of $391,493.04. Offsets amounting to $49,042.30 reduced the judgment to $342,450.74.

In addition, the court directed that from April 3, 1950, until the judgment is paid, interest should be paid at 4% on the 1855 value of $67,820.00 (Concl. of law, R. 89–90; Op., R. 99–100). The amount of the judgment, less attorneys' fees will, when deposited into the Treasury, bear interest at 4% under the Act of August 26, 1935, c. 686, sec. 4, 49 Stat. 801.

REASONS FOR GRANTING THE WRIT

1. If the Government's petition for certiorari on the value issue is granted in the companion case of *United States* v. *Alcea Band of Tillamooks, et al.*, No. 281, certiorari on that issue should be granted in this case since the questions are the same. Here the Court of Claims followed the pattern adopted in the *Alcea* case. In fact, the court below used the $1.20 per acre value in Alcea as a standard of comparison and concluded the Rogue River land was worth 20 cents less per acre because "the valuable timber which covered most of the tract and was of the same general character as that found on the Alcea tracts, was not as accessible, there was no gold or coal actually mined on the tract, and the commercial potentialities were not as attractive as on the Alcea tract with its several ocean harbors" (Op., R. 92–93, 99). It follows that if the $1.20 value found in Alcea is based on an erroneous standard, the same is true of the $1.00 value in this case.

903489—50——2

There is also present a secondary question of valuation in this case. The court below valued the 67,820 acres as if the Indians owned a full, unencumbered fee when, in fact, if they had any title at all, it was qualified by the Government's right to move other tribes onto the land, thus reducing the area they might "actually" occupy and correspondingly reducing the Government's obligation to them upon their removal to another reservation.

2. The court below held that respondents were entitled to recover the 1855 value of the 67,820-acre reserve, plus interest at specified rates from that year forward to the date of judgment. In doing so, the court regarded the lands as having been "reserved" by the Indians from the cession embraced in the treaty (Concl. of Law, R. 68). "They ceded certain of the lands owned by them and *retained other lands described in such treaty*" (Op., R. 71). The court held that when the Indians were removed from the 67,820-acre reserve, and the Government failed to sell the lands as provided in the treaty, there was a taking compensable under the Fifth Amendment, and allowed interest as an element of just compensation. Thus, the 1855 value of $67,820 was inflated to approximately six times that amount by the addition of interest totalling $309,357.16. The court rejected the Government's contention that

the Government was liable at most for a breach of the contract to sell the lands actually occupied by the Indians and that therefore interest was not allowable. If the 67,820 acres were ceded to the United States, then there was of course no taking of property of respondents when they were removed from that area. The Government believes the court was in error in holding that the 67,820 acres were not ceded to the United States.

The Treaty of November 29, 1854, 10 Stat. 1128, is one of a series negotiated with various bands of Indians in Oregon Territory pursuant to the Act of June 5, 1850, 9 Stat. 437. Section 1 of that act authorized the President to appoint commissioners "to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains." The Act expresses a twofold objective, the extinguishment of the Indians' land claims in the area west of the Cascades, and removal of the Indians themselves to the east of these mountains.

Initially, a series of nineteen unratified treaties were negotiated in 1851 with various bands or tribes of Indians in Oregon, the first six by commissioners appointed under the above-cited statute, the remaining thirteen by Anson Dart, Super-

intendent of Indian Affairs for Oregon Territory.[3]

While these treaties are not directly here involved, it is noteworthy that eight of the nineteen contained express reservations of lands from the cessions to be made by the Indians. For example, by Article 3 of the Treaty of April 16, 1851, with the Santiam Band of the Calapooya Tribe, the Indians ceded to the United States certain described lands "Except the reservation hereinafter set forth." And Article 4 provided that "said Band, or Tribe, shall reserve to their own use, and control, within the bounds above set forth, with the provisions hereto annexed, the lands in the following bounds," etc. These reservations by the Indians from their cessions of lands west of the Cascades were contrary to the objective of the statute under which they were negotiated. Thus, in transmitting the treaties to the Secretary of the Interior, the Commissioner of Indian Affairs expressed himself in general terms as being unable to express "a confident opinion respecting their merits" and further observed that the treaties "contain provisions of doubtful expediency." Such generalizations were particularized by the Secretary in his letter transmitting the treaties to the President, wherein he stated that "The provisions referred to by the Commissioner as being

[3] These unratified treaties are listed on page 21 of Exec. Doc. No. 25, 53d Cong., 1st sess., and the treaties themselves are on file in the National Archives and Records Service, Division of Legislative Reference and Records.

of doubtful expediency, I understand to be those relating to the reservations of particular districts for the residence of the Indians near the settlements of the whites." (Sen. Ex. Doc. No. 25, 53d Cong., 1st sess., pp. 20–21.) It was thus recognized that the treaties, in so far as they allowed the Indians to withhold part of their lands from the cessions and did not require complete relinquishment of the Indians' claims, were contrary to the statute under which they were negotiated. While the precise reason for nonratification of these treaties cannot be fixed, it is significant that the shortcomings of the treaties were brought to the attention of the Senate by the President, since he transmitted with the treaties the letter of the Secretary in which those shortcomings were emphasized (App., *infra,* p. 19). In any event, this history shows, first, that exceptions or reservations of lands from the cessions were recognized as being contrary to the policy of the 1850 statute, and these early treaties themselves show that where it was intended that the Indians reserve lands from the cession, express and unmistakable language was employed to that effect.

Subsequently, as the court below sets out (Fdg. 4, R. 30), six treaties were entered into with the plaintiff tribes in this case, and all six treaties were ratified. The Treaty of September 10, 1853, with the Rogue River Tribe, 10 Stat. 1018; the Treaty of September 19, 1853, with the Cow Creek Band of Indians, 10 Stat. 1027; the Treaty of

November 18, 1854, with the Chasta, Scotons, and Grave Creek Bands of Indians, 10 Stat. 1122; the Treaty of November 29, 1854, with the Umpquas and Calapooias, 10 Stat. 1125 (the treaty here involved); the Treaty of January 22, 1855, with the Willamette Valley Bands, 10 Stat. 1143, and the Treaty of December 21, 1855, with the Mo-lal-la-las or Molel Tribe, 12 Stat. 981. These six treaties were negotiated for the Government by Joel Palmer, Indian Superintendent who succeeded Anson Dart in that office. It will be observed that three of them were entered into before the Treaty of November 29, 1854, with the Umpquas and Calapooias, here involved, and two after that treaty was negotiated.

Mere examination of the five treaties other than the Umpqua and Calapooia treaty makes it clear that the Indians were not permitted to except any of their land from the cession. Thus, by Article 1 of the Rogue River Treaty, 10 Stat. 1018, the Indians ceded "all their right, title, interest, and claim" to a described area. By Article 2, the Indians were given only the right "to occupy temporarily" a described portion of the ceded area "until a suitable selection shall be made by the direction of the President of the United States for their permanent residence * * *." Similarly, by Article 1 of the Treaty of September 19, 1853, 10 Stat. 1027, the Cow Creek Band ceded "all their right, title, interest, and claim, to all the lands" therein de-

scribed. By Article 2, the Indians were "allowed to occupy temporarily" a described portion of the ceded area until a permanent residence was selected for them. By Article 1 of the Treaty of November 18, 1854, 10 Stat. 1122, the Chasta, Scotons and Grave Creek Bands ceded "all their country" as described and agreed to remove immediately after ratification of the treaty to the Table Rock reservation, the one temporarily set up in the Rogue River Treaty. By Article 1 of the Treaty of January 22, 1855, 10 Stat. 1143, the Willamette Valley Bands ceded "all their right, title, and claim" to a described area, and under Article 2 were permitted only "to remain within the limits of the country ceded, and on such temporary reserves as may be made for them * * * until a suitable district of country shall be designated for their permanent home * * *." By Article 1 of the Treaty of December 21, 1855, 12 Stat. 981, the Mo-lal-la-las ceded "all their right, title, interest and claim" to a described area. And by Article 3, they agreed to confederate with the Umpquas and Calapooia Bands and remove to a new reservation on the Yamhill River.

It is thus clear that in five of the six ratified treaties, three of which preceded and two of which followed the treaty with the Umpquas and Calapooias, no title to any lands within the ceded area was permitted to remain or recognized as being in the Indians. Since all six treaties were ne-

gotiated by the same agent for the United States, pursuant to a statute which looked to complete extinguishment of Indian claims in Oregon, these five treaties are material in construing the sixth, the Treaty of November 29, 1854, which is here in question.

It is recognized, of course, that an exception could have been made with respect to the Umpquas and Calapooias. But as already noted (pp. 10–11, *supra*), when it was intended to except lands from the cession, as in the case of certain of the unratified treaties, that intention was made crystal clear. The treaty here involved lacks language supporting the view that the Umpquas and Calapooias were alone so favored as to be allowed to retain title to any part of their ceded lands.

By Article 1 of the treaty, the Umpquas and Calapooias "cede to the United States all their country included within the following limits * * *." Certainly, this language, in legal contemplation, surrendered to the United States whatever title the Indains had or claimed to the whole area described, including the 67,820 acres set up as a reservation, and this result should not be overturned unless there is language equally decisive in legal contemplation to except or reserve part of the lands from the cession.

Such language is not present in the provisions of the treaty setting up the reserve which the court below finds the Indians to have withheld

from the cession. The second paragraph of Article 1 opens with the following: "Provided, however, that so much of the lands as are embraced within the following limits, shall be held by said confederated bands, and such other bands as may be designated to reside thereupon, as an Indian reservation." It will be observed that this proviso completely lacks words showing an intention to except or reserve the area from the outright cession contained in the first paragraph. The words "reserve" and "except" nowhere appear in the proviso. It does not purport to deal in terms of title. It simply gives the respondents, and any other Indians designated by the United States, the same sort of residence or occupancy privileges as were accorded the Rogue River, the Cow Creek, and the Willamette Valley Bands or Tribes by the ratified treaties above discussed. Under the treaty the United States had the unqualified right to move other bands onto the 67,-820-acre reserve (Op., R. 91). If it had done so and thus confined the Umpquas and Calapooias to a smaller area, the sole obligation of the Government was to sell only "the particular tracts" "actually occupied" by the respondents and apply the proceeds to improvements on the reservation to which they might be removed. This right to cut down the area "actually occupied" by the respondents and thus reduce the obligation of the Government to respondents on their removal is irreconcilable with the idea that

the respondents retained a full compensable title in the reserved area. The intention and real object of the treaty was to give respondents no greater interest in the reserve than had been allowed the other tribes with which ratified treaties were negotiated, i.e., temporary occupancy until they might be removed elsewhere. The proviso in Article 1 requiring the Government to sell tracts actually occupied by the Indians at the time of their removal to provide improvements on the new reservation does not compel the conclusion that title was in the Indians. That provision was intended to do no more than to place the Indians in as good a position, with respect to improvements, on the new reserve as they were on the old reserve.

Finally, if such a vital exception had been intended in the case of the Umpquas and Calapooias, alone of all the plaintiff tribes with whom treaties were negotiated and ratified, it would be expected that Joel Palmer, who negotiated all six treaties for the Government, would not only have noted this sole exception, but would have felt impelled to explain it. However, it is clear that Palmer considered the arrangement made with the Umpquas and Calapooias as leaving in the Indians only temporary occupancy privileges similar to those which had been accorded the other tribes. In transmitting the Umpqua and Calapooia treaty to the Commissioner of Indian Af-

fairs one month after the treaty was negotiated, Palmer in his letter of December 29, 1854, referred to the 67,820-acre reserve agreed to in the following terms (Def. Ex. 27): "I have designated for these bands, a small temporary Reserve isolated from the settlements, and containing agricultural lands sufficient for their use, but they will necessarily be required to settle along the narrow River bottom and on small creeks too sparse to make it a desirable location; * * *."

It is submitted that the true construction of the treaty is that all of the lands of the respondents were ceded to the United States. This being so, there was no taking of Indian land for which compensation must be paid under the Fifth Amendment. The Government's sole liability to the Indians stems from a failure to carry out the contracted obligation to sell so much of the land of the United States, in the 67,820-acre area set up as a reserve, as was actually occupied by the Indians at the time of their removal. And it is well established that for breach of contract, absent a provision in the contract or a statute showing a contrary intention, interest cannot be charged against the Government. *Smyth* v. *United States,* 302 U. S. 329, 353; *Albrecht* v. *United States,* 329 U. S. 599, 605; *Angarica* v. *Bayard,* 127 U. S. 251; *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *North American Co.,* 253 U. S. 330, 336.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1950.

APPENDIX

[Presidential letter of July 31, 1852; National Archives and Records Service, Division of Legislative Reference and Records]

WASHINGTON, *July 31st 1852.*

To the Senate of the United States:

I communicate to the Senate herewith for its constitutional action thereon, nineteen treaties negotiated by Commissioners on the part of the United States, with various tribes of Indians in the Territory of Oregon; accompanied by a letter to me from the Secretary of the Interior and certain documents having reference thereto.

MILLARD FILLMORE.

U. S. GOVERNMENT PRINTING OFFICE: 1999